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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

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THE PEOPLE,

Plaintiff and Respondent,

v.

JEREMY ROBERT SCOTT,

Defendant and Appellant.

C043353

(Super. Ct. Nos. SF086301A,  
SF085705A, LF006599A)

Evidence obtained in a search of defendant Jeremy Robert Scott provided the basis for his criminal prosecution in three separate cases. After his motion to suppress evidence under Penal Code section 1538.5<sup>1</sup> was denied, defendant entered into a negotiated disposition on the three cases, whereby he pled guilty to residential burglary (§ 459), possession of a firearm by a felon with prior convictions (§ 12021, subd. (a)), evading a police officer (Veh. Code, § 2800.2), two counts of attempted

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<sup>1</sup> Undesignated statutory references are to the Penal Code.

auto theft (§ 664; Veh. Code, § 10851, subd. (a)), one count of possession of a controlled substance (§ 11377, subd. (a)) and one count of forgery (§ 470, subd. (a)). He was sentenced to an aggregate term of seven years in prison. Defendant appeals the denial of his motion to suppress. We shall affirm the judgment.

#### STATEMENT OF RELEVANT FACTS

On September 25, 2002, at 11:17 a.m., Sergeant Arrellano was involved in a high speed chase of a maroon Ford Explorer. The pursuit started when the Explorer entered the freeway at speeds between 85 and 90 miles per hour. It continued through a residential area at speeds between 45 and 70 miles per hour, during which the Explorer ran through controlled intersections, hit curbs and traveled into oncoming traffic. Arrellano had his lights and siren activated during the pursuit. Eventually, however, he lost sight of the Explorer.

Officers Swanson and Acevedo responded to Arrellano's call for assistance regarding the Explorer. Officers Swanson and Acevedo were driving in separate patrol cars, with Swanson following Acevedo by about 100 yards. Both officers drove past defendant, walking on the street, talking on his cell phone and carrying some clothing.

About one block and one-half away from where the officers saw defendant, they found the Explorer. Acevedo and Swanson smelled fresh brake pad smoke coming from the Explorer and when Acevedo touched the hood it was hot. There were no other cars or pedestrians in the area.

When Swanson saw Acevedo investigating the Explorer, he made a u-turn, got on his radio and advised that defendant was a possible suspect and he was going to contact him. This call was made at approximately 11:24 a.m.

Approximately one and one-half to two and one-half blocks away from the Explorer, Swanson pulled his vehicle alongside defendant and yelled out, "Hey there." Defendant did not respond. Swanson drove closer to defendant and honked his horn twice. Again, defendant did not respond. Swanson pulled forward, got out of his patrol car and approached defendant. At this time, Officer Long, in his patrol vehicle, was responding to Swanson's request for assistance and heading toward Swanson and defendant. Officer Long also noted there were no other pedestrians or any other vehicle traffic in the area.

Officer Swanson walked towards defendant and from about 10 feet away, said, "Hey there, hold up a second." His gun was not drawn. Defendant turned and looked at Swanson; he was shaking, sweating, and breathing heavily and his voice was quivering. He appeared very nervous. Swanson asked defendant to step over to the police car and he did, speaking on the cell phone the entire time. As defendant walked to the police car, Officer Long arrived and stood to his left.

Swanson told defendant to put his cell phone and the clothing he was carrying on the hood of the police car and defendant did. Twice Swanson asked defendant to put his hands on the hood of the police car and defendant did not comply.

Defendant started turning and twisting his shoulders left and right and turning his head, which led Officers Swanson and Long to believe he might attempt to flee. To prevent this, Swanson pushed defendant down in the mid-back over the hood of the police car. While bent over, defendant tried to straighten up. Swanson and Long then handcuffed defendant.

Prior to commencing a patdown search, Swanson saw a gun magazine clip sticking out of defendant's back pants pocket. Swanson removed three magazines loaded with nine-millimeter ammunition from defendant's back pants pocket. He also removed some keys, one with the word "Ford" printed on it, a small flashlight, and a garage door opener in defendant's front pants pocket.

After hearing the broadcast from Swanson about defendant, Arrellano arrived at the scene. Arrellano confirmed there were no other pedestrians in the area. After the patdown search revealed the magazines loaded with ammunition, Arrellano asked defendant where the gun was. Defendant said it was at a friend's house, but would not tell him where the friend lived. Arrellano then lifted some of the clothing on the hood of Swanson's car and found a nine-millimeter gun in the pile of clothing. Defendant was then placed in the patrol car.

Arrellano took the "Ford" key found in defendant's pocket to the maroon Explorer. The key fit the door and started the engine. The gun belonged to Officer Hudson of the Stockton

Police Department, whose home had been burglarized a few days earlier.

## DISCUSSION

### I.

Defendant contends the trial court erred in denying his motion to suppress. He bases this contention on his claim that defendant's initial encounter with Officer Swanson was not consensual and he was therefore, immediately seized; that Officer Swanson did not have reasonable grounds to detain defendant as he had not been provided with any physical description of defendant; that there were insufficient grounds to conduct a patdown search of defendant; that the seizure and handcuffing of defendant was an arrest; and that the forcible detention was not justified. We reject each contention in turn.

"The standard of appellate review of a trial court's ruling on a motion to suppress is well established. We defer to the trial court's factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment." (*People v. Glaser* (1995) 11 Cal.4th 354, 362.)

Here, the trial court ruled the initial detention by Officer Swanson was justified, the subsequent handcuffing was not an arrest, and the forcible detention was justified by the actions of defendant indicating resistance and imminent flight.

A.

Defendant claims his initial encounter with Officer Swanson was not a consensual encounter and that there were "Insufficient Grounds To Detain [him] Based On The Information Known" to Officers Swanson and Long. Specifically, he contends the encounter was transformed from a consensual encounter to a detention when Swanson approached defendant and yelled, "hold up" and defendant complied with this request.

Law enforcement officers can approach a citizen on the street and ask questions without implicating Fourth Amendment interests, whether or not the officers have any reasonable suspicion of criminal law breaking, so long as the encounter is consensual. (*Florida v. Bostick* (1991) 501 U.S. 429, 434-435; *Wilson v. Superior Court* (1983) 34 Cal.3d 777, 784.) However, the police-citizen encounter will amount to a detention when, by way of physical force or show of authority, the officer in some manner restrains the liberty of the citizen. (*Ibid.*)

To determine whether it is a consensual encounter or a detention we ask, taking into account all the circumstances surrounding the encounter, would the conduct of the police "have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business[?]" (*Michigan v. Chesternut* (1988) 486 U.S. 567, 569.) If the answer to this question is yes, it is a detention.

In this case, we do not see the grounds for defendant's complaint. Defendant claims the encounter became a detention

when Officer Swanson pulled his car over, got out of the vehicle and directed defendant to "hold up." The trial court agreed with defendant that at this point, the encounter became a detention.

Furthermore, we agree with the trial court's conclusion that the detention was supported by reasonable suspicion. "A detention is reasonable under the Fourth Amendment when the detaining officer can point to specific articulable facts that, considered in light of the totality of the circumstances, provide some objective manifestation that the person detained may be involved in criminal activity." (*People v. Souza* (1994) 9 Cal.4th 224, 231.) "The possibility of an innocent explanation does not deprive the officer of the capacity to entertain a reasonable suspicion of criminal conduct. Indeed, the principal function of his investigation is to resolve that very ambiguity and establish whether the activity is in fact legal or illegal to 'enable the police to quickly determine whether they should allow the suspect to go about his business or hold him to answer charges.' [Citation.]" (*In re Tony C.* (1978) 21 Cal.3d 888, 894.)

Here, at 11:17 a.m. Officer Swanson heard a broadcast about a high-speed pursuit involving Sergeant Arellano and a maroon Ford Explorer that was suspected to have been stolen. The broadcast gave specific information as to the area where Arellano was looking for the Explorer.

Swanson noted a person walking down the street, and approximately one block and one-half away he and Acevedo located what appeared to be the Ford Explorer that had been involved in the chase. They could smell hot brakes and the Explorer appeared to have been hastily parked. Swanson did not see any other people in the neighborhood and no other vehicles were driving around. Swanson called dispatch at 11:24 a.m. and informed them he was going to investigate a possible suspect.

Contrary to defendant's claim, these facts considered in their totality support a reasonable suspicion of criminal conduct. Here, officers found what appeared to be the Explorer involved in the high-speed chase; it was hastily parked and smelled of hot brake pads. Swanson noticed defendant one block and one-half away from the deserted Explorer only seven minutes after the initial report about the high-speed chase. Defendant was the only person in sight, with no other pedestrian or vehicle traffic in the area. These facts and circumstances justified Officer Swanson's decision to make an investigatory stop. (*U.S. v. Bautista* (9th Cir. 1982) 68 F.2d 1286, 1289; *U.S. v. Purry* (D.C. Cir 1976) 545 F.2d 217, 220.) Although there could have been an innocent explanation for these facts, it was not unreasonable for Swanson to investigate defendant to determine whether he had been involved in the chase. (See *In re Tony C., supra*, 21 Cal.3d 888, 894.)



B.

Defendant next contends there were "Insufficient Grounds To Conduct A Pat Search" of defendant. We disagree.

"[A] pat-down search for weapons may be made predicated on 'specific facts or circumstances giving the officer reasonable grounds to believe' that defendant is armed [citation] or on other factors creating a potential for danger to the officers [citations].'" (*People v. Superior Court (Brown)* 111 Cal.App.3d 948, 956.)

Defendant focuses his analysis of this issue on what did not occur in this case, but completely disregards what did occur. Defendant was sweating, shaking, and breathing heavily, his voice was quivering and he appeared nervous. He repeatedly resisted the officers and refused to comply with their requests. Finally, and most significantly, Officer Swanson saw loaded magazine clips for a pistol protruding from defendant's pocket. It is reasonable that the totality of these circumstances "could generate a belief in a police officer that his safety was in danger. Consequently, the patdown search was justified." (*People v. Avila* (1997) 58 Cal.App.4th 1069, 1074.)

C.

Defendant next contends that handcuffing him and conducting a patdown search of him transformed the detention into an arrest which was not supported by probable cause. Specifically, he contends the force used by the officers went beyond that necessary for a detention.

"[T]he permissible purpose of a detention is to investigate the suspicion of criminal activity on which the detention was predicated: '[T]o permit a speedy, focused investigation to confirm or dispel individualized suspicion of criminal activity.' [Citations.] 'A brief stop of a suspicious individual, in order to determine his identity or *to maintain the status quo momentarily* while obtaining more information, may be most reasonable in light of the facts known to the officer at the time.' [Citation.]" (*People v. Soun* (1995) 34 Cal.App.4th 1499, 1516.)

"A police officer attempting to make an investigatory detention may properly display some force when it becomes apparent that an individual will not otherwise comply with his request to stop, and the use of such force does not transform a proper stop into an arrest." (*U.S. v. Thompson* (9th Cir. 1977) 558 F.2d 522, 524.) "Levels of force and intrusion in an 'investigatory stop' may be legitimately escalated to meet supervening events, such as attempted flight. [Citations.] Other kinds of suspicious behavior may lead an experienced officer to fear for his safety, thus justifying an escalation in the level of force used. [Citations.]" (*U.S. v. White* (D.C. Cir. 1981) 648 F.2d 29, 40.)

Here, defendant appeared nervous, was turning his head and shoulders from left to right, as though to flee. To prevent this, Swanson pushed him down onto the hood of the car. Swanson told defendant to put his hands on the hood at least two times

and defendant did not comply. Defendant continued to try to straighten up and struggled with the officers despite their telling him to stop. As they went to handcuff defendant to prevent his flight and stop his resistance, Swanson saw a loaded magazine clip in defendant's pocket. It was not unreasonable in these circumstances for the officers to handcuff defendant to prevent his flight and resistance and to conduct a patdown search to ensure defendant was not armed. Such action did not transform the detention into an arrest. (*U.S. v. Bautista, supra*, 684 F.2d 1286, 1289; *U.S. v. Purry, supra*, 545 F.2d 217, 219-220.) The handcuffing and patdown search represented reasonable force designed to maintain the status quo while Swanson completed the investigatory stop and obtained more information. (*People v. Brown* (1985) 169 Cal.App.3d 159, 167.)

## II.

Defendant's final contention is that the court did not award him all of the custody credits to which he was entitled. The People properly concede the issue. Accordingly, we will order the abstract of judgment amended.

## DISPOSITION

The judgment is modified to give defendant credit for an additional four days of presentence custody credit, for a total of 144 days, and an additional three days of conduct credit, for a total of 72 days. The trial court is directed to amend the abstract of judgment accordingly and to forward a certified copy

thereof to the Department of Corrections. As modified, the judgment is affirmed.

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SIMS, Acting P.J.

We concur:

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RAYE, J.

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MORRISON, J.